MISCELLANY.

Bill of Particulars in Criminal Cases.—The right of one accused of violation of the Virginia Prohibition Law (Acts 1916, p. 215) to demand a bill of particulars, so that he may have the protection guaranteed by the Constitution is fully covered by a recent opinion in the case of Pine *v.* Commonwealth, 93 S. E. 652. Delivering the opinion of the majority of the court Judge Burks says:

"We have no case in this state involving the right to demand a bill of particulars of either the commonwealth or the defendant in a criminal case, but the practice is a common one in a great majority of the states, and also in the federal courts. 22 Cyc. 371, 372, and cases cited. In Mathis *v.* State, 45 Fla. 46, 34 South. 287, a very comprehensive review of the authorities is given, but it is not deemed necessary to refer to or discuss them further than to say that, in a number of the cases referred to, it is said that the granting of a bill of particulars lies in the discretion of the trial court, whose ruling on the subject is not subject to review.

"In many cases this is probably true, but it is not true when the charge in the indictment is too general and indefinite to apprise the defendant of the cause and nature of his accusation, without the aid of some sort of specification, or a bill of particulars. Wherever this is the case, it is reversible error for the trial court to refuse to require such particulars to be furnished.

"Except in the single case of an indictment under the prohibition law, the law of this state is that there cannot be more offenses than there are counts in the indictment, and, if the commonwealth offers evidence of more than one, the proper practice is for the defendant to ask the court to compel the commonwealth to elect for which one it will prosecute. Hatcher & Shaw's Case, 106 Va. 827, 55 S. E. 677.

"The right to call for, and the duty to furnish, a bill of particulars in civil cases, is of frequent application, and is regulated by section 3249 of the Code. The statute confers the right "in any action or motion," and declares how it may be enforced. We do not think that this statute was intended to apply to a criminal prosecution, but the right is inherent in the trial court, in the orderly administration of justice, to prevent wrong and injustice to persons who are presumed to be innocent, and to assure to them their constitutional rights. State *v.* Lewis, 69 W. Va. 472, 72 S. E. 475, Ann. Cas. 1913A, 1203. It is not to be presumed that less particularity is required in a criminal prosecution than in a civil action. The object of the bill is to state with greater particularity than is done in the indictment "the cause and nature of his accusation." The indictment, of course, must charge the offense, and if it fails to give the information necessary to enable the defendant to concert his defense, such information may be supplied by a bill of particulars but

if the offense is not charged in the indictment, the defect cannot be supplied by a bill of particulars. A bill of particulars may supply the fault of generality or uncertainty, but not the omission of an essential averment of the indictment. Such being the function of the bill of particulars, it is readily observed that by giving an absolute right to demand it the indictment may be greatly simplified, as is done in the present instance, and at the same time no injury or injustice be done to the accused.

"The language of the indictment is comprehensive enough to embrace the offenses intended to be charged, but, as to some of them, is not specific enough to give to the defendants the information to which they are entitled. Prior to the statute every misdemeanor enumerated in the statute might be charged in separate counts in one indictment, but each count would have to set out the offense with requisite certainty. **The change made by the statute consists in allowing all of the offenses to be charged in one count, instead of many counts, but, whether charged in one or many, either the indictment itself must inform the defendant of the cause and nature of his offense, or this information must be furnished in some other way, if demanded. If it is not given in the indictment, and no other method is provided for giving the information, the defendant will be denied his constitutional right.** The same section of the Constitution which gives to him the right to demand the cause and nature of his accusation also gives to him the right to a jury trial. He is as much entitled to one as to the other. If a jury trial is denied in the administration of criminal law, it is as much a violation of the constitutional right of the defendant as if it had been denied by statute. Hence, if the frame of the indictment under section 7 be upheld, as we think it should be, then the defendant must, in some other way, in proper cases, when demanded, be informed of the cause and nature of his offense, else he will be denied a constitutional right by the manner in which the statute is administered. We cannot look to the evidence and say that the defendant has not been injured by a denial of this right. As well might we say that, if a defendant was clearly guilty and a jury trial had been refused, no injury has been done him. **A denial of a constitutional right is of itself reversible error.** We suppose that no one would doubt that, however guilty a defendant might be, if the trial court denied him a jury trial, its judgment would of necessity have to be set aside. It is no greater hardship to require the commonwealth to give the prisoner such information of the offense charged against him as will enable him to prepare to meet the charge than it is to require a private litigant to furnish like information to his opponent. The act under which the defendants were indicted requires that it shall have a liberal construction, and we think we have given it such a construction in upholding the sufficiency of section 7. We

have not in any way marred its efficiency by requiring a bill of particulars stating the nature of the offense in proper cases, when demanded. As pointed out by Judge Buchanan in Hatcher & Shaw's Case, 106 Va. 827, 55 S. E. 677, all of the jurors may think that the accused is guilty, and so find him, without having in fact agreed that the evidence as to any particular sale was "sufficient," when in fact the prisoner is entitled to a unanimous verdict on every offense charged. Whether or not he shall be tried for more than one offense is to be determined by other considerations, which involve the doctrine of election."

Judge Sims while concurring with the majority opinion, dissents in part, and to support his contrary view on this point cites numerous Virginia cases establishing the rule that the charge of a statutory offense in the language of the statute creating it includes all that is of the essence of the offense, except the laying of the venue and an allegation to bring the case within the prescribed period of limitations. He concludes that under this firmly settled rule, "established before the statute in question was enacted, so far as the particulars of the offenses charged in the indictment are concerned, the indictment itself gave to the accused all the information necessary for the preparation of his defense which the Constitution requires; and therefore the indictment needed no bill of particulars to aid it.

"Indeed, if the practice of requiring a bill of particulars to be furnished in criminal cases, heretofore unused in Virginia, were adopted by us in practice, if that practice were made to accord with it as prevailing elsewhere (as indeed is noted in the majority opinion), it would not be mandatory upon, but would rest merely in the sound discretion of, the trial court, to require a bill of particulars in certain cases. This would not, in all cases, aid the indictment in the matter of particularity of its allegations, of its descent from the general to specific allegations. And it would open up a wide field of judicial uncertainty as to when the court should exercise its discretion to require a bill of particulars to aid the indictment in complying with the constitutional requirement aforesaid. The majority opinion suggests that the practice of requiring a bill of particulars in such case be adopted with this addition to the practice, namely, that its requirement be made mandatory in certain cases. This would be something new in procedure never prevailing as a hard and fast rule at common law. I Bishop on Cr. Pr. §§ 454, 633. And if the latter rule were adopted it would be in effect but a requirement that the indictment be more specific in its charges of the offenses in question than has been the practice heretofore in Virginia. The change in practice would accomplish nothing new or beneficial in effect. If an indictment is insufficient to comply with the requirements of section 8 of the Virginia Constitution, the ques-

tion can be raised as well by motion to quash the indictment under our established practice as by a motion for a bill of particulars to aid the indictment. With all due deference, therefore, I am of opinion that there is no need for any change of practice on the subject; and I think, moreover, that such change would open a Pandora's box of uncertainties about matters which have been long set at rest by the decisions of this court.

"The majority opinion, while saying that the indictment is sufficient under section 8 of the Virginia Constitution, yet holds it insufficient unless aided by a bill of particulars. The opinion holds that the indictment is sufficient on demurrer only and because the constitutional requirement in question is not that the needed information must be furnished by an indictment, and hence that it may be furnished in some other way, namely, by a bill of particulars, and that the court, by changing the practice in Virginia so as to require a bill of particulars in such case in aid of the indictment, can supply the constitutional requirement in question. With the utmost deference, it seems clear to me that in making such requirement the court is adding a requirement not in the statute, and to that extent it is modifying and changing (and in effect repealing) the statute. There is no statute or rule of practice heretofore, existing in Virginia providing for a bill of particulars in criminal cases. Hence the Legislature, by the act in question, has, in effect, said that the indictment in the form in which it is in the instant case is sufficient in itself to inform the accused of the cause and nature of his accusation, without the aid of anything else whatsoever. To hold otherwise is to abolish this rule everywhere established; in doing so to overrule the long line of decisions in Virginia on the subject; and further, in effect, to repeal the statute under consideration pro tanto.

"I am not opposing the idea that the requirement of a bill of particulars in criminal cases, as in civil cases, would be in aid of the accused, in that it would lessen the burden otherwise resting upon him of coming to trial prepared to make his defense in all particulars against the charges against him put in issue by the indictment, or that the appeal might not be very strong to the Legislature to provide for such aid being extended to the accused in some criminal cases; but it seems to me that it is significant that the Legislature has never so provided, and further that our courts have never put such a practice into effect in any criminal cases. And on appeal to the Legislature to enact such a provision, if made, I can understand how the Legislature might regard the commonwealth in prosecuting the statutory offenses under consideration as not standing in the same position as to possession of information before trial of particulars touching the commission of the offense or offenses put

in issue as is the plaintiff in a civil case touching the particulars of his own cause of action; they being naturally within his own knowledge. Hence I can understand how the Legislature might hesitate to require the same particularity of statement of the commonwealth in such cases as is required (by statute in Virginia) of a plaintiff in civil cases, by bill of particulars, and how such requirement might result in serious and undue embarrassment of the former in enforcing the statute creating such offenses, and how the Legislature might decline to extend such aid to the accused in such cases, as indeed it has declined to do by enacting, as it has done by the statute in question, that the indictment in question is sufficient as aforesaid. If this is a hardship upon the accused in such cases, it is a hardship imposed by the Legislation, which, if not inhibited by the Constitution, the courts are powerless to relieve against.

"Hence the question involved in the proposition that the court shall inaugurate the practice of requiring a bill of particulars in cases of the character under consideration in turn involves, after all, the ultimate question whether the statute in enacting, in effect, that an indictment charging the offenses as they are charged in the instant case, is in violation of section 8 of the Constitution of Virginia. As we have seen above, such question must, as I feel, be answered in the negative and in favor of the sufficiency of such an indictment.

"It is true, as noted in the majority opinion, that section 7 of the said statute omits the charge of the offense of transporting ardent spirits for sale from the form of indictment thereby prescribed. This was a manifest clerical omission. Its effect is, clearly, only that, under an indictment following the form of such section of the statute, no evidence of transporting ardent spirits for sale would be admissible, if objected to, and in such case, unless the indictment was properly amended, there could be no conviction thereunder of the offense of transporting ardent spirits for sale. No such evidence was offered or admitted in the instant case, and so this point does not arise therein.

"It results from the foregoing considerations that the only change which section 7 of said act has made in the law, as it was aforetime, is to allow, in the charge of an offense or offenses under the statute, all of the offenses created by sections 3, 4, and 5 thereof to be charged in one indictment.

"As correctly pointed out in the majority opinion, if the indictment is sufficiently specific in its charges to be valid under section 8 of the Constitution of Virginia (and the act is not in contravention of section 62 of the Virginia Constitution), the power of the Legislature to provide such form of indictment is plenary, and the indictment is good. As we have above seen, the indictment does not contravene section 8, and the majority opinion agrees that it does not contravene section 62, aforesaid.

"The conclusion necessarily follows that upon such an indictment as that in the instant case the accused is put upon his defense of all of the offenses charged in the indictment, and must come to trial prepared to defend against all of such charges.

"From the standpoint of the accused the hardship and danger of injustice resulting from such a requirement as that mentioned in the last above paragraph is more theoretical than real. It is, in truth, less burdensome in loss of time and expense to the accused to meet a number of charges in one trial than in a number of separate trials. The accused has to bring his witnesses to meet all of the charges upon which he is in fact indicted, either in several or in one trial. The punishment prescribed by the statute for several offenses of which the accused may be found guilty in one trial is no greater than if there were several trials and, in practice, it is a matter of common knowledge that the aggregate of punishment inflicted by the verdict of one jury in a single trial is apt to be less than of several different juries in separate and distinct trials. And if there be any hardship in the requirement that the accused must come to the trial prepared to defend against a number of charges in the indictment in one trial, since there is no infringement of his constitutional guaranties and the power of the Legislature is plenary on the subject, to the extent it has gone in the enactment in question, as stated in substance above, the courts are powerless to affort the accused any remedy. The Legislature has spoken on a subject left by the Constitution, and wisely left, I think, in its discretion. It is not within the province of the courts to interfere with that exercise of this legislative function."